No. 2538

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BERTHA D. WITKOUSKI, *et al.*,
Defendants in Error,

vs.

CONSOLIDATED INTERSTATE-CALLAHAN MINING COMPANY, a Corporation,
Plaintiff in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States District Court, for the District of Idaho, Northern Division.

PLUMMER & LAVIN
of Spokane, Wash.,
and
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STATEMENT OF CASE.

This is an action to recover damages for wrongful death, instituted by defendant in error in her own behalf as widow, and as Guardian *ad Litem* for and on behalf of two minor, male children, aged five and eight years, for the death of the husband and father, while an employee of plaintiff in error, a mining company, which occurred near Wallace, Idaho, on May 18th, 1916. The cause came regularly on for trial, resulting in a verdict in favor of defendants in error, in the sum of $15,000.00. Motion for new trial was seasonably made and overruled, and judgment was entered upon the verdict, from which judgment, so rendered, this appeal is prosecuted.

THE FACTS.

Plaintiff in error, a mining corporation, owns and operates a certain zinc-lead producing mine in Shoshone County, Idaho, and at the time of the happening of the accident which resulted in the death of deceased, was engaged in the development of and extraction of ore from, such mine. Among other workings of the mine, there existed a certain vertical shaft, over 300 feet in depth, through which shaft men and materials were lowered and raised by means of a skip, cage, or bucket, oper-

ated by a compressed air hoist. One end of the cable which raised and lowered the skip was attached to a cross-arm, at the top of the skip, and the other end was attached to a revolving drum, fastened upon the shaft of the hoist; among other mechanical parts of the hoist was a clutch band, which was adjusted by means of a threaded nut or bolt, and the tension of the clutch band, which served as a brake, could be adjusted by loosening or tightening the nut or bolt, so as to retard and control the action of the skip or bucket. The miners worked eight-hour shifts, and on each shift the hoisting machinery was in charge of and operated by an employee known and designated as a hoistman. The hoistman was under the immediate supervision of the master mechanic, to whom he was required to report any defects in the hoist that might arise during its use and operation. It was the duty of the master mechanic to make daily inspections of the hoist, and to make such repairs as were necessary, and the rules of the plaintiff in error (Tr. 68), provide that it was the duty of the mechanical department to daily inspect the hoisting apparatus, and to see that the same was in a safe condition, and if the same appeared to be out of order, to make such repairs as were necessary before continuing hoisting operations.

The cable on the hoist being a new one, would frequently warp or kink on the drum. When this occurred it was necessary to unwind the cable, and rewind it upon the drum. In order to give the drum greater velocity, and permit it to unwind more freely, it was customary to loosen the clutch bolt, which relaxed the tension of the brake band. This bolt was loosened by the hoistman of the shift immediately preceding that upon which deceased was employed, and after the cable was unwound, the hoistman and crew began rewinding the cable, but did not tighten the clutch bolt. The hoist was turned over by the hoistman to the succeeding hoistman, Egbert, who was operating it at the time of the accident, and the preceding hoistman failed to inform Egbert of the loosening of the clutch bolt, or of the fact that it had not been retightened. The hoistman who loosened the clutch bolt testified that the shaft of the hoist, upon which the drum revolved was sprung, and that if this condition had not existed, it would not have been necessary to loosen the clutch bolt. (Tr. 122-159.)

The master mechanic testified for plaintiff in error, that it was necessary to loosen the clutch bolt before unwinding the cable, and that it was the duty of the hoistman to retighten the clutch

bolt before rewinding the cable. (We quote from the testimony of the master mechanic as follows (Tr. 236):

"Q. What is the custom, when cable is to be rewound upon the spool or drum, as to releasing the clutch?

* * * * * * * *

THE COURT: Get right at it. What is the custom?

A. Why release this clutch bolt and unwind the cable to the place where it is slack, and then rewind it so that it is even.

Q. And then after it is rewound the nut is tightened again?

A. The nut is tightened before you start to rewind.

Q. Do you know whose duty it was to loosen and tighten that nut when the cable was being rewound?

A. It was the hoistman's duty."

Again, on page 242 of the Transcript:

"Q. You would loosen the screw to unwind the cable?

A. Yes, sir.

Q. And then you would tighten it and then rewind the cable?

A. Tighten up the screw and pull up the clutch lever, you see; you see there is a lever that operates that clutch, and in order to change that cable you simply release that lever, undo the screw—

Q. If it had been handled properly, you

mean, by the preceding shift, that unwound the cable, they would have tightened the screw after they finished unwinding and before they began to rewind it? In other words, the shift before Mr. Witkouski's shift unwound or started to reverse this cable?

A. Yes, sir."

The defective condition of the hoist was reported to the master mechanic (Tr. 145), who, himself, had told the hoistman to loosen this clutch bolt (Tr. 142), and the testimony showed that if it was not so tightened, the hoistman was liable to lose control of the skip at any time (Tr. 146).

It was admitted that when the deceased's shift came on duty, the previous shift had rewound all but about 75 feet of the cable (Tr. 244). In order to accelerate the speed of the hoist, the hoistman had released the clutch band or brake, by loosening the clutch bolt, and when his shift had completed their day's work, he turned the hoist over to the next hoistman, Egbert, who operated the hoist on the shift on which deceased was working, but said hoistman on said previous shift said nothing to the hoistman on the succeeding shift, Egbert, of his failure to tighten the bolt, and therefore, the Court can readily see, as was observed by the trial judge in his opinion on the motion for

new trial (Supplemental Tr. 21), that even if Witkouski knew of the mechanical conditions of the hoist, and the necessity for loosening and tightening this bolt, he would have had a right to assume that the bolt had been tightened before he went on shift, because it was customary to tighten the bolt before the cable was rewound, and the rewinding had been almost completed by the previous shift.

The Court will notice on page 237 of the Transcript, the following testimony of witness Hughes, the company's master mechanic:

> "Q. If there was any repairs to be made you made them?
>
> A. Yes, sir.
>
> Q. Did they ever notify you of any repairs which were needed which were not made?
>
> A. They have not.
>
> CROSS-EXAMINATION.
>
> Q. You was at the head of that department (the mechanical department), I assume?
>
> A. I was.
>
> Q. And any repairs that was reported to you or that you knew of you would see that they were made?
>
> A. I did."

We now quote from the testimony of witness Egbert (Tr. 145):

> "Q. State whether or not you ever advised the master mechanic with reference to the condition of this hoist, and the danger of operating it.
>
> A. I did.
>
> * * * * * * * *
>
> Q. What did you say to him?
>
> A. I pointed out the defects, those defects in the clutch to him."

Rule 28 of the company, offered and received in evidence (Tr. 68), reads as follows:

> "It shall be the duty of the mechanical department to daily inspect the hoisting ropes and engines to see that the same are in a safe condition and in proper repair, and if at any time the rope or any part of the machinery shall appear to be out of order, to have the same repaired before continuing with the hoisting."

Deceased, with three other laborers, who were engaged in sinking the shaft, got upon the skip or bucket for the purpose of being lowered to the bottom of the shaft, where they were directed to work, and after being lowered a short distance, the hoistman lost control of the bucket, and it fell, and deceased becoming frightened and terror stricken, and believing that he would be killed if he remained upon the bucket, attempted to catch

hold of a cross-piece of timber in the shaft, and missing his hold, fell to the bottom of the shaft, and was instantly killed. The deceased knew nothing about the defective condition of the hoist. The hoistman operating the hoist at the time of the accident testified that he made every effort possible to stop the descent of the bucket after he discovered that he had lost control of it (Tr. 134). Deceased at the time of his death was 37 years of age, with a life expectancy of 30.35 years, and was earning from $5.00 to $7.00 per day.

THE RECORD.

Plaintiff in error in its preparation of the Transcript of Record has failed to include the motion for new trial, which was served, filed and argued, and the opinion of the trial court and the order denying the motion. This was for the reason, no doubt, that the trial court recited in the opinion, matters and things that occurred at the trial which were not contained in the original Transcript of Record. To the end that this court may be fully informed, we have had prepared a Supplemental Transcript containing the motion for new trial (Sup. Ab. 7), and opinion of the trial court (Sup. Ab. 16), from which it will appear that the matters now assigned as error were not embraced in

the motion for a new trial, and such matters, under numerous rulings, should not be considered by this court.

THEORY OF PLAINTIFF IN ERROR AT TIME OF TRIAL.

It was conceded at the time of trial, as will be found from the opening statement of counsel for plaintiff in error, that the rapid descent of the skip or bucket was due wholly to the defective condition of the hoist, due to the act of the preceding hoistman in loosening the nut or clutch bolt (Tr. 177).

The plaintiff in error, pleaded certain defenses in the answer (20-30-31), but nowhere in the answer did it allege that the accident was the result of negligence of the operating hoistman, in actual operation of the hoist, and that he, being a fellow servant, defendants in error could not recover. No instruction defining such theory was requested, nor were the instructions given excepted to.

ARGUMENT.

Before proceeding to a discussion of this case, we respectfully direct your Honors' attention to the assignments of error (Tr. 280), and especially to assignments 3, 4, 5 and 6 (Tr. 285-289).

Assignment 1 (Tr. 269), deals with the question of fellow servant as applied to the mechanical and operating departments, and while no complaint is made with reference to the matters contained in the instruction, complaint is made because the instruction fails to include the further consideration that if the entire crew were at the time engaged in the common employment of re-winding the cable, then they had all become for that time, fellow servants, employed in the mechanical department. Assuming, for the purpose of argument only, that this is true, suffice to suggest that the accident did not occur while the cable was being rewound, but occurred while deceased was upon the skip or bucket. and was being lowered into the shaft, and he was then engaged as an operative, and at that time was not engaged in the mechanical department, if, in fact, he ever was engaged in that department, which we do not admit.

Subdivision 2 (Tr. 269), questions the validity of another instruction. A reading of the record at this point will show that the trial court, acceding to counsel's suggestion that the instruction might mislead, recalled the jury and explained that an inaccuracy had occurred, and changed the instruction complained of, and to the instruction so given,

no exception was taken (Tr. 274).

The Court will observe, by examining the assignments of error now made, that plaintiff in error has waived any error that might have occurred, so far as the instructions are concerned, by failing to properly preserve exceptions, and plaintiff in error should not be allowed to incorporate assignments of error for the first time in the Transcript of Record, nor to present its case upon a theory different from that upon which it was tried. This court has heretofore held that exceptions to instructions given, in order to be considered by an appellate court, must be taken at the trial, and while the jury is at the bar, and such fact must affirmatively appear.

See:

Alverson vs. Oregon-Washington R. & Nav. Co., 236 Fed. 331.

Counsel will no doubt contend that the hoistman and deceased were fellow servants. Plaintiff in error, as already pointed out, admitted that the sole cause of the accident was the act of the preceding hoistman in loosening the nut or bolt on the clutch (Tr. 177). It will not be questioned that the loosening of the clutch bolt or the failure

to tighten it before using the hoist was the negligence of someone, and the only controlling question if not substantially the only question involved, had exceptions been properly preserved, would be, was the plaintiff in error responsible therefor?

This question of fact was submitted to the jury under instructions of which no complaint is made. The instructions expressly told the jury that even though it found that the defendant was chargeable with negligence relative to the loose screw, still if Witkouski, the deceased, had knowledge of its defective condition, and notwithstanding such knowledge attempted to use the hoist, defendants in error could not recover. There was no proof that deceased had such knowledge.

We anticipate that it may be contended that the accident was due to the careless operation of the hoist by Egbert, the hoistman, who went on duty at the same time as deceased, but the plaintiff in error did not try the case upon such theory. It pleaded certain affirmative defenses, but nowhere did it allege that the accident was due to the negligence of Egbert, and that he, being a fellow servant of deceased, defendants in error could not recover. No instruction was requested defining such theory, and the instructions given were not ex-

cepted to in that respect. The plaintiff in error conceded that the accident was due solely to the fact that the clutch did not properly function, and surely if plaintiff in error had been contending, as it will no doubt now, for the first time contend, that the carelessness of the hoistman was the proximate cause of the death of deceased, proper exceptions would have been taken to the instructions. Furthermore, the hoistman testified that he did everything he possibly could do to stop the rapid descent of the skip after he discovered he had lost control of it (Tr. 134).

Summing up, and in the light of the facts most favorable to plaintiff in error, in this case, the plaintiff in error, acting in the person of the hoistman, loosened the clutch bolt, and then negligently failed to tighten it before attempting to lower the deceased to the working place. The mechanical department performed the non-delegable duties of the plaintiff in error in keeping the hoist in proper condition of repair. Upon this phase plaintiff in error will no doubt cite the case of Quebec S. S. Co. vs. Merchant, 133 U. S. 375. The apparent relevancy of the case lies only in the fact that the servant who was negligent was called a "carpenter," but the duty he negligently performed was

not that of carpenter at all, but of an attendant or porter. He was an operative only, and was not repairing or inspecting the ship. In no sense was he a vice-principal. It is elementary that it is not what an employee is called, but the nature of his service that fixes his status.

The instruction given which is now complained of in the transcript, but to which no exception was taken or preserved, is as follows:

> "If you find from the evidence that the witness Lytton, who was the hoistman upon the shift immediately preceding Egbert, and Egbert were under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that the deceased, and other pushers, as they are called, that is, occupying the same position that he did, with other shifts or crews, and you further find that Witkouski, the deceased, and other pushers, had no authority over or right to give orders to or direct said hoistmen as to matters and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and that said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that such conduct on his part was negligence contributing to or causing the injury, and his act in so leaving the screw and failing to notify Egbert constituted the proximate cause or contributed to the death of the deceased, then you should find

> for the plaintiffs, unless you further find that Witkouski knew or had reason to believe in the existence of the mechanical conditions which did exist, and which constituted the defective conditions of the hoist, and was further able to appreciate the risk incident to such condition, and notwithstanding such knowledge or information, and such ability to appreciate the risk, attempted to ride down upon the bucket, when the hoist was in such defective condition."

This instruction, to which no exception was taken, as required by the rule and by the decisions of this and other courts, is more favorable to plaintiff in error than need be, and the Court would have been justified, in view of the evidence, and the theory of plaintiff in error, taken in connection with the opening statement, and the admissions therein contained, in directing a verdict in favor of defendant in error. Your Honors can search the record and you will not find the charge excepted to in any manner, and therefore the error now claimed is not available in this court.

These suggestions should make it unnecessary to discuss this case further, but in order to illustrate the erroneous contention of plaintiff in error, that the deceased and the hoistman were fellow servants, we direct your Honors' attention to the following facts. The deceased was killed while he was

upon the skip or bucket, being lowered to the working place. The proximate cause of his death was the defective condition of the hoist. It is admitted that the hoist and the hoistman were a part of the mechanical department. Deceased had nothing whatever to do with the hoist or hoisting apparatus. The master mechanic, who had charge of the mechanical department, testified that it was the duty of the hoistman to tighten the cluch bolt not only before proceeding to lower the men but before rewinding the cable. He failed to perform this duty. In the light of these admitted facts, it would be carrying the doctrine of fellow servant too far to hold the hoistman and the deceased fellow servants.

See:

Baltimore & Ohio R. Co. vs. Baugh, 37 Law Ed. 772.

McCabe & Steen Co. vs. Wilson, 52 Law Ed. 788, 2d Case, 792.

In the Baugh case, *supra,* the Court say:

> "So, oftimes there is in the affairs of such corporations, what may be called a manufacturing or repair department, and another strictly operating department; these two departments are in their relations to each other.

as distinct and separate as though the work of each was carried on by a separate corporation, and from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintendents and has control of it, is as to it in the place of the master."

And in the Wilson case, *supra,* it is said:

"There remain for consideration these matters: One, the contention that the plaintiff was a fellow servant with the foreman of the gang at work on the bridge and the superintendent of construction; another, the question of negligence on the part of the defendant; and a third, contributory negligence. With reference to the first, it must be borne in mind that the plaintiff was a fireman employed on a locomotive, and his work was in a separate department from that of the employees engaged in the construction of the bridge. This is not a case for the application of the doctrine of fellow servant. It would be carrying that doctrine too far to hold that one employed as a fireman and engaged in the movement of a train was a fellow servant with the superintendent of construction and the foreman of a bridge gang, both of whom were present and engaged in supervising and directing the work on the bridge. These latter employees represented the principal in an entirely different line of employment from that in which plaintiff was engaged, were discharging a positive duty of the master to provide a safe and suitable place and structures in and upon which its employes were to do their work,—Union P. R. Co. v. O'Brien, 161 U. S. 451, 40 Law Ed. 766, 16 Sup. Ct. Rep. 618, and cases cited

> in the opinion,—and, in discharging that positive duty, they, and not he, were the representatives of the defendant. Their action, so far as that work was concerned, was the action of the defendant."

See also, Christianelli vs. Saginaw Mining Co. (Michigan), 117 N. W. 910, holding that the engineer of a hoist, in so far as the performance of his duty to keep the place safe was concerned, was not a fellow servant of an employee engaged in loading machinery onto the hoist.

See also, Swift vs. Short, 92 Fed. 567 (8th Circuit), where the Court in dealing with an action brought to recover damages for injuries sustained by a servant through the defective wiring of a clutch, where contention was made that the servant injured was a fellow servant of the machinist who repaired the clutch, said:

> "It is furthermore insisted in the brief that. in any event, the plaintiff should not have recovered, because the defective wiring of the shoe, if not done by the plaintiff himself, was at least done by his fellow servants, and that the defendant cannot be held responsible to the plaintiff for their negligence. The conclusive answer to this question is that, if the wiring was done by other persons in the employ of defendant, and was neither done by the plaintiff nor under his supervision, then, in the matter of making such repairs, such other servants were performing a personal

> duty which the master owed to the plaintiff, and the rule of respondeat superior applies. Balch v. Haas, 36 U. S. App. 698, 701, 20 C. C. A. 151, and 73 Fed. 974; Minneapolis v. Lundin, 19 U. S. App. 247, 249, 7 C. C. A. 344, and 58 Fed. 525; Railroad Co. v. Keegan. 160 U. S. 259, 264, 16 Sup. Ct. 269."

See also, Northern Pacific Ry. Co. vs. Herbert. 29 Law Ed. 755, at p. 760, the Supreme Court of the United States, quoting approvingly from Shanny vs. Androscoggin Mills (Maine), says:

> "On the trial the defendants contend among other things, that if the defective covering was owing to the negligence of a fellow servant, whose duty it was to repair it, they were not liable. But the Court said that the person whose duty it was to keep the machinery in order, so far as that duty goes, was not, in any legal sense, a fellow servant of the plaintiff. To provide machinery and keep it in repair, and to use it for the purpose for which it was intended, are very distinct matters. They are not employments in the same common business, tending to the same common result."

And again, at p. 760, the Court say:

> "If, however, he was appointed (to look after machinery and appliances and keep them in repair), charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable."

And in the same case, Mr. Justice Harlan, in a concurring opinion at page 762, said:

"Between an agent, charged with the performance of the company's duty to provide and maintain safe and suitable appliances and machinery, and the employees who use them, the relation of fellow servant does not exist."

And in the same case, at page 759, the Court say:

"The business of providing safe machinery and keeping it in repair is distinct from the business of handling and moving it, and these are separate and independent departments of service, *though the same person may by turns render service in each,* and the person engaged in the former represents the employer, and in that business is not the fellow servant with one engaged in the latter."

See also:

Regan vs. Parker-Washington Co. (C. C. A., 7th Circuit), 205 Federal, 692.

Houston vs. Brush (Vt.), 29 Atl. 380-383.

Higgins vs. Williams (Cal.), 45 Pac. 1041.

Steel vs. Grant (N. C.), 82 S. E. 1038.

Maki vs. Isle Royal Copper Co. (Mich.), 147 N. W. 533.

Rincicotti vs. John J. O'Brien Cont. Co. (Conn.), 60 Atl. 115.

Zellars vs. Missouri Water & Light Co. (Mo.), 92 Mo. Appeals, 107.

See also, Hough vs. Texas & Pac. Ry. Co., 25 Law Ed. 612, opinion by Mr. Justice Harlan, the Court say:

> "The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, where the employer is a corporation, by officers and agents, does not relieve the corporation from that obligation. The agents who are charged with the duty of supplying safe machinery, are not in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the servant renders service by turns in each, as the convenience of the employer may require. * * * "The corporation is equally chargeable, whether the negligence was in originally failing to provide or in afterwards failing to keep its machinery in safe condition."

See also:

Union Pac. Ry. Co. vs. Snyder, 38 Law Ed 597-601.

We ask in all sincerity, can there be any question of fellow servant involved in this case? There being "departments of service" can there be any doubt that the condition of the hoist was due to the negligence of the mechanical department, of which Mr. Hughes was the head, as master mechanic, and the hoist was operated in its defective condition, under his direction, and with his personal knowledge?

A vast number of cases might be collected, announcing the same principles of law, but it would avail no good purpose to extend this brief. The facts are not in dispute; there can be no logical presentation of the law as applicable to the contention of plaintiff in error, and we therefore respectfully urge that the verdict and judgment should be affirmed.

Respectfully submitted,

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